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No. 96-479

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

ADVANCED COMMUNICATIONS CORPORATION,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE FOR THE FOUNDATION FOR EDUCATIONAL ADVANCEMENT TODAY IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Pursuant to S. Ct. Rule 37.2(b), the Foundation for Educational Advancement Today ("FEAT") moves to file the attached brief amicus curiae in support of the Petitioner. Petitioner and other parties have consented to the filing of this brief, but United States Satellite Broadcasting, Inc. has refused consent, necessitating this motion.

FEAT is a tax-exempt, charitable organization created to promote education by harnessing the enormous potential of digital satellite technologies to provide multimedia and interactive telecommunications services for use in schools and libraries across the United States. FEAT was formed in 1988 and chaired by the Hon. Wilbur D. Mills, who, along with Petitioner Daniel H. Garner, President of Advanced Communications Corporation ("Advanced"), sought to encourage and sponsor the use of Direct Broadcast Satellites ("DBS") for educational broadcasting.

To help further the goal of providing distance learning services via satellite, Advanced pledged to donate two DBS transponders to FEAT and FEAT planned to provide free DBS receivers to schools and libraries across the nation. Based on this commitment from Advanced, FEAT proposed to underwrite, in part, Your Educational Services ("YES") Networks to provide interactive educational transmissions to schools and libraries using both television and personal computer technology. Planning for the YES Networks progressed through grants FEAT received from the United States Department of Education and the State of Arkansas.[1] In conjunction with these proposals, in 1993 Advanced became the first DBS permittee to develop plans for interactive DBS service. C.A. App. 322, 439.

These educational proposals were a central feature of the Advanced DBS application. A 1992 publication by the National Association of Broadcasters characterized the Advanced DBS plan as follows:

> One of ACC's foundation strategies centers around education. The company believes that DBS will allow it to provide low-cost transmission of an unprecedented number of educational services to homes and schools anywhere in the nation. There will be two basic types of services offered—one a television-based educational course, and the other a computer-based course. Both will include seminars, educational games, and other educational materials using live instructors, video, audio, interactive multimedia, computers and other techniques. ACC believes its system vastly improves the benefit-to-cost ratio over current distance learning distribution methods.

Michael S. Alpert and Marcia L. DeSonne, DBS—THE TIME IS NOW (May 1992) at 45 (C.A. App. 744).

FEAT participated in proceedings below before the FCC, urging it to grant the Advanced requests. FEAT

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[1] *See e.g.*, U.S. Dept. of Ed., *A Program To Develop an Initial Blueprint for the YES Networks*, December 1990.

informed the Chairman and Commisioners of the FCC that Advanced had agreed to donate two transponders (which initially would provide twelve video channels) for use by FEAT and the YES Networks.[2]

FEAT agrees with the views of Advanced set forth in the petition for certiorari, and strongly believes there are additional reasons why the Court of Appeals should not have deferred to the FCC as it did. As set forth in the attached brief, both the Communications Act and the FCC's own policies are designed to encourage the provision of new technologies and services to the public and to increase educational opportunities. Yet the FCC's actions below had the inevitable effect of delaying DBS service and forestalling the development of DBS as a conduit for educational programs and services. In light of these obvious inconsistencies with the Commission's statutory mandate, the Court of Appeals should have scrutinized the FCC's actions more carefully, especially in light of the many core communications policies implicated.

Petitioner has indicated that it will demonstrate how the lure of adding huge sums to the federal treasury improperly enticed the FCC to auction the DBS spectrum originally reserved for Advanced. Moreover, the Petitioner has indicated that it will explain why the Court of Appeals' deference to the FCC, in light of this pecuniary interest, was in error. The Petitioner has not indicated that it will rely on the argument, detailed in the attached brief, that the Court of Appeals' deference was erroneous because the FCC's decision subverted key communications statutes and policies and demonstrated a failure of agency expertise. Nor has Petitioner indicated that it will rely on the argument that public statements by decisionmaking personnel tainted the validity of this adjudicatory proceeding. Because these arguments are directly pertinent

[2] Alternatively, the transponders could be used to provide hundreds of mixed multimedia channels to transmit text, CD-quality audio, computer software, graphics and other interactive programs.

to the resolution of this case but will not be adequately presented by the parties, FEAT respectfully moves for leave to file the attached brief addressed to these arguments.

Respectfully submitted,

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QUESTIONS PRESENTED

Amicus will address the following questions:

(1) Whether the Court of Appeals erred in deferring to a Federal Communications Commission decision to cancel the Advanced Communications Corporation Direct Broadcast Satellite permits where that decision is contrary to precedent and demonstrably inconsistent with Communications Act policies promoting the development of new technologies, the expedition of service, the provision of educational programming and the administration of spectrum auctions.

(2) Whether the Court of Appeals erred in deferring to the Commission's decision where the Order did not demonstrate agency expertise and the circumstances surrounding it revealed evidence of prejudgment.

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BRIEF AMICUS CURIAE FOR THE FOUNDATION FOR EDUCATIONAL ADVANCEMENT TODAY IN SUPPORT OF PETITIONER

INTEREST OF AMICUS CURIAE

The Foundation for Educational Advancement Today ("FEAT") is a tax-exempt, charitable organization created to promote education by harnessing the enormous potential of digital satellite technologies to provide multimedia and interactive telecommunications services for use in schools and libraries across the United States. FEAT was formed in 1988 and chaired by the Hon. Wilbur D. Mills, who, along with Petitioner Daniel H. Garner, President of Advanced Communications Corporation ("Advanced"), sought to encourage and sponsor the use of Direct Broadcast Satellites ("DBS") for educational broadcasting.

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[1] *See e.g.*, U.S. Dept. of Ed., *A Program To Develop an Initial Blueprint for the YES Networks* (December 1990).

informed the Chairman and Commissioners of the FCC that Advanced had agreed to donate two transponders (which initially would provide twelve video channels) for use by FEAT and the YES Networks.[2] In light of Advanced's pending waiver request and assignment application, FEAT noted that Advanced "is now working with Tempo Satellite, Inc. to dedicate two transponders to educational uses as Advanced originally proposed." Letter from Richard L. Mays, Chairman, FEAT, to Reed E. Hundt, Chairman, Federal Communications Commission (Aug. 15, 1995) (C.A. App. 740). FEAT further informed the Commission that Advanced had committed to contribute $15 million to assist FEAT in providing a wide array of educational services. By denying the Advanced request, the FCC effectively ended any such plans.

STATEMENT OF THE CASE

The underlying facts and course of proceedings below are set forth fully in the brief filed by the Petitioner and will not be repeated here. As Petitioner has demonstrated, the FCC's decision to deny its extension request is deeply flawed because it places the Commission's newfound interest in becoming the "Federal Cash Cow" ahead of its statutory responsibilities. Stricter scrutiny of the Commission's decision-making process is compelled in this case because the agency's pecuniary interest compromised its ability to provide the impartial tribunal that due process requires. *See* Pet. 15-22.

But there are additional reasons why the deferential approach employed by the Court of Appeals is inappropriate. The denial of the Advanced waiver request and assignment application involves issues that go to the heart of communications policy in the United States, with an impact that extends beyond this one proceeding. For

[2] Alternatively, the transponders could be used to provide hundreds of mixed multimedia channels to transmit text, CD-quality audio, computer software, graphics and other interactive programs.

example, the Communications Act declares that "[i]t [is] the policy of the United States to encourage a provision of new technologies and services to the public." 47 U.S.C. § 157. Indeed, the FCC in the very *Order* under review confirmed that one of its "primary goals" is to "expedite the provision of additional DBS service in order to foster competition both among DBS providers and between DBS and cable."[3] The *Advanced* decision also has significant ramifications for the myriad communications policy initiatives to increase educational opportunities in the United States[4] as well as the emerging debate over the use of auction authority to allocate broadcast spectrum. *See, e.g.*, 47 U.S.C. § 309(j). Despite these statutory requirements, the FCC adopted an order *that it knew* would delay DBS service, that paid no heed at all to the effect of its decision on educational efforts available via DBS, and that directly subverted the statutory mandate of FCC auction authority.

This Court has made clear its acute awareness of "the changes taking place in the law, the technology, and the industrial structure, related to telecommunications." *Denver Area Educational Telecommunications Consortium, Inc. v. FCC*, 116 S. Ct. 2374, 2385 (1996). Other courts similarly have noted the critical importance of communications policies that "have a substantial impact on an industry that permeates the daily life of this nation and helps shape, for good or ill, our culture and our politics." *Schurz Communications, Inc. v. FCC*, 982 F.2d 1043, 1050 (7th Cir. 1992).

The FCC is the bureaucratic bottleneck through which these vital interests must pass, and where, as here, a single FCC decision implicates many, if not most of the

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[3] *Advanced Communications Corporation*, 11 FCC Rcd. 3399, 3401 (1995) (Pet. App. 15).

[4] *E.g.*, 47 U.S.C. § 303(b); 47 U.S.C. § 335(b)(1).

policy questions central to these changes, it is inappropriate to treat that decision as "just another case coming out of yet another agency here in town charged with making yet another broad public interest determination." *Cf. Syracuse Peace Council v. FCC*, 867 F.2d 654, 676 (D.C. Cir. 1989) (Starr, J., concurring), *cert. denied*, 493 U.S. 1019 (1990). To the extent there is a substantial governmental interest in regulating a given medium because it may exert "bottleneck" control over speech,[5] there most certainly is a vital interest in carefully reviewing agency action that also serves as a bottleneck for a wide range of speech-related concerns.

This is not to suggest that all FCC licensing or policy decisions must be subjected automatically to a heightened level of judicial scrutiny. But where, as here, a single decision lies at the intersection of core communications policies at a time of profound change, more searching review is necessary. In this unique circumstance, reviewing courts cannot defer uncritically to FCC decisions, particularly where the stated reasons for decision mask a hidden agenda that is contrary to the Communications Act and the public interest, and where public statements by decisionmaking personnel suggest that there was a less than impartial tribunal. More thorough review of the misuse of the Commission's broad discretion in this case is not just a requirement of due process, it is good civic hygiene.

SUMMARY OF ARGUMENT

The Commision's decision in *Advanced Communications Corp.* is diametrically opposed to its well-established policies regarding the promotion of new technologies, the need to expedite DBS services, the interest in promoting educational programming and the administration of spectrum auctions. Such inconsistencies survived judicial

[5] *Turner Broadcasting System v. FCC*, 114 S. Ct. 2445, 2466 (1994).

review only because the Court of Appeals declined to look beyond the text of the FCC *Order*, and deferred completely to the Commission's judgment. However, such deference is inappropriate where key concepts were left unexplained, key evidence overlooked, arguments that formerly persuaded the Commission were ignored and contradictions within and among Commission decisions were passed over in silence. The FCC's purported distinctions with prior cases were utterly unsupported by the record.

Additionally, the Court of Appeals erred by deferring to the FCC's decision where the *Order* revealed a failure of expertise and where a disconcerting number of public comments on the merits of this adjudicatory proceeding were made by decisionmaking personnel. The reviewing court should have more closely examined the process and voided the Commission decision where such behavior compromised both the appearance and the substance of due process.

ARGUMENT

I. THE COURT OF APPEALS ERRED IN DEFERRING TO A COMMISSION DECISION THAT IS CONTRARY TO PRECEDENT AND DEMONSTRABLY INCONSISTENT WITH COMMUNICATIONS ACT POLICIES.

The FCC's *Advanced* decision unveiled a regulatory world in which up is down and black is white. In pursuit of its "primary goal" of expediting the provision of additional DBS service, *Advanced Corp.*, 11 FCC Rcd. at 3401, the FCC eliminated a DBS permitee who was on the verge of initiating competitive service and adopted an auction plan that the Commission knew would delay service, perhaps for years.[6] It is not known exactly how much

[6] *See* 11 FCC Rcd. at 3430 (Dissenting Statement of Commissioner James Quello) ("[t]he practical public interest result of the majority decision [is that] the date for the arrival of first-ever

delay in expanding competitive DBS service the FCC caused by revoking Advanced's permits, but there appears to be a consensus that the period must be measured in years.[7]

At the same time, even as the Commission has proclaimed repeatedly its vital interest in promoting educational opportunities for school children through a variety of communications policies, it ignored the efforts of Advanced and FEAT to provide innovative educational programs via interactive technologies and DBS frequencies. And in the face of a categorical statutory prohibition against deciding to auction spectrum based upon the potential revenues it might raise, 47 U.S.C. § 309(j)(7)(A), the FCC canceled the Advanced permits, noting repeatedly its desire to "recover for the public a portion of the value of the public spectrum resource made available for commercial use." *Advanced Corp.*, 11 FCC Rcd. at 3424 & n.127 (Pet. App. 48).

DBS service to Alaska and Hawaii is unclear; and additional multichannel video programming competition from another DBS provider will be delayed."); *Id.* at 3439 (Dissenting Statement of Commissioner Andrew Barrett) ("I am convinced that today's decision . . . will considerably delay additional DBS service to the public."); *Id.* at 3441 (Separate Statement of Commissioner Susan Ness) (arguments that "canceling the construction permit will disrupt business plans of a number of parties . . . certainly [have] some merit"); *Id.* at 3444 (Separate Statement of Commissioner Rachelle Chong) (noting the "additional delay associated with recovery of the spectrum" and hoping that such delay "can be minimized").

[7] *See* Donald K. Dement, THE DBS REVOLUTION 39 (National Assn. of Broadcasters, Oct. 1996) ("From [the *Advanced*] decision a two-year delay resulted in DBS operation at this prime slot while MCI builds its satellites."); *DirecTV, Inc. v. FCC*, No. 96-1001 (D.C. Cir. 1996) (in appeal of FCC auction decision following *Advanced*, EchoStar has argued that it will take MCI up to six years to build and launch satellites). *See also In Oral Argument, Satellite Companies Call for Remand of DBS Auction Rules*, THE CABLE-TELCO REPORT (Oct. 21, 1996) at 13-15.

Despite these obvious inconsistencies, the Court of Appeals applied an exceedingly deferential standard of review. Pet. App. 5. The court accepted at face value the Commission's conclusory statements regarding its public interest goals and failed to question the FCC's mischaracterizations of the record that supported its erroneous distinctions between cases. The Court's analysis did not look beyond the "text of the Order," Pet. App. 9, even though it was obvious from the record that the *Order*'s text was more pretext than it was a careful weighing of the facts before the agency.

Even in cases that do not implicate the range of critical issues found here, the "presumption of agency regularity," *Louisiana Ass'n of Independent Producers v. FERC*, 958 F.2d 1101, 1111 (D.C. Cir. 1992), does not immunize the Commission from the rules of logic or the requirement that issues be honestly evaluated. The agency "must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.' " *Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29, 43 (1983). Blind references to an agency's expertise "cannot be used as a cloak for fiat judgments" that "ignore[] direct evidence" in the record or create "intolerable conflict[s]" with prior decisions. *Tennessee Gas Pipeline Co. v. FERC*, 926 F.2d 1206, 1210, 1211 (D.C. Cir. 1991). The deference owed an expert agency "cannot be allowed to slip into a judicial inertia," *Bureau of Alcohol, Tobacco and Firearms v. Federal Labor Relations Authority*, 464 U.S. 89, 97 (1983), and courts must not "rubber-stamp . . . administrative decisions [that are] inconsistent with a statutory mandate or that frustrate the Congressional policy underlying a statute." *NLRB v. Brown*, 380 U.S. 278, 291-292 (1965). *See Allied Chemical & Alkali Workers v. Pittsburgh Plateglass Co.*, 404 U.S. 157, 166 (1971).

A reviewing court must determine whether an agency "has relied on factors which Congress has not intended

it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43. *See also Schurz Communications, Inc.*, 982 F.2d at 1050.

In short, principles of administrative review do not require judicial blindness to the real world efforts of Commission decisions. In this case, however, the Court of Appeals elevated administrative boilerplate over reality, approving without serious review conclusory statements that were flatly contradicted by record evidence, and upheld policy outcomes at odds with precedent and Communications Act mandates. Specifically, the court agreed with the Commission's conclusion that the public interest required sacrificing expedited service that would flow from granting the Advanced request in exchange for theoretical gains in service that would flow from stricter (albeit highly selective) enforcement of due diligence guidelines.

However, the course of proceedings before the Commission should have alerted the Court of Appeals that the goal of expediting service was of little importance to the FCC. The matter languished before the agency for over five months despite the fact that all parties stressed the need for expedited review.[8] Tellingly, the decision was made less than a week after one of the parties—MCI Communications Corporation—filed a two paragraph letter with the Commissioners in which it "reaffirm[ed] its commitment to participate in the auction and . . . submit an opening bid of $175 million." C.A. App. 768. This promise of money played a critical role in the FCC's deci-

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[8] C.A. App. 544, 561-562, 600-601. Although the applications for review were filed with the Commission by mid-May, 1995, and the pleading cycle completed by mid-June, the matter sat before the agency without action for four months, until October 16.

sion.[9] The smoking gun was revealed in a subsequent speech by Chairman Reed Hundt in which he boasted that "[w]e intended all along [in the *Advanced* case] to raise in auctions of the airwaves more money than Bill Gates has." Reed E. Hundt, *Speech to the Artist's Rights Foundation* (Feb. 15, 1996) (as prepared for delivery).

Even if the Commission had acted expeditiously, its stated rationale cannot withstand scrutiny. No deference is required where an agency decision consists of "boilerplate" recitation of claims that the agency has fully considered the evidence but where in fact "[k]ey concepts are left unexplained, key evidence is overlooked, arguments that formerly persuaded the Commission and that time has only strengthened are ignored, [and] contradictions within and among Commission decisions are passed over in silence." *Schurz Communications, Inc.*, 982 F.2d at 1050. Indeed, when the Commission's proffered distinctions between this and other DBS cases are "[s]tripped of verbiage," the *Advanced* decision, "like a Persian cat with its fur shaved, is alarmingly pale and thin." *Id.*

The Court of Appeals should have been more rigorous in its review since the Commission's reasoning flatly contradicted its established policies in this area. The FCC had urged applicants to "combine assignments and resources through merger or buyout" (just as Advanced and Tempo proposed) in order to enhance the technical and commercial viability of DBS.[10] Moreover, the Commis-

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[9] Not only was this $175 million figure noted in the Commission's decision to revoke the Advanced permits, Pet. App. 48 n.127, but Commissioner Andrew Barrett wrote in the companion decision to auction the spectrum that a fellow Commissioner had approached him to ask whether MCI's promised bid "would persuade me that auctioning ACC's channels was appropriate." C.A. App. 160 n.5. The "pledge" of $175 million was mentioned repeatedly in the auction proceeding. *Id.* at 136 n.123, 137 n.129, 142, 143 n.147, 160 & n.4.

[10] *See Continental Satellite Corp.* 4 FCC Rcd. 6292, 6299 (1989).

sion had granted extensions of time to applicants who held their DBS authorizations longer than Advanced;[11] it had granted multiple extension requests to other applicants;[12] and it had approved transfers and extensions of time for unbuilt DBS construction permits.[13] Indeed, the FCC had granted every request for an extension of time to construct DBS facilities before the *Advanced* decision, and it has granted every request since.

Ultimately, the FCC's public interest finding, that the *Advanced* decision would "expedite" DBS service, boiled down to a single assertion: that the decision was necessary to prevent "warehousing" of spectrum. This assertion, however, would have crumbled under the slightest scrutiny of the FCC's prior decisions and the facts in the record, if the court had subjected it to such review. The FCC's contradictory position was highlighted by its decision in *Directsat Corp.*, which the Court of Appeals agreed is "a more difficult case." Pet. App. 7. In reviewing the FCC's decision in *Advanced*, the court unquestioningly accepted the FCC's claims that Directsat made "steady and consistent [progress] with the schedule established in its construction contract," while Advanced "consistently delayed the schedule established in its construction contract." Pet. App. 7.

But the Commission's conclusory characterization was an utter distortion of the facts in the record. Indeed, Directsat's due diligence filings at the FCC revealed that it amended its satellite contract seven times and its payment schedule at least four times. Its first major payment

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[11] *U.S. Satellite Broadcasting Co.*, 3 FCC Rcd. 6858 (1988); *Dominion Video Satellite, Inc.*, 3 FCC Rcd. 6858 (1988).

[12] *U.S. Satellite Broadcasting Co.*, 7 FCC Rcd. 7247 (Video Services Div. 1992) ("*USSB II*"); *Dominion Video Satellite, Inc.*, 8 FCC Rcd. 6680 (1993) ("*Dominion II*").

[13] *Directsat Corp.*, 10 FCC Rcd. 88 (1995); *Directsat Corp.*, FCC File No. 131-SAT-EXT-95 (International Bureau, released Jan. 11, 1996) (C.A. App. 279).

deadline was put off successively, and no payment was ever made before the FCC approved the transfer of control of the construction permit to EchoStar. Directsat had paid only one eighth of one percent of the contract price of the satellites, and because of repeated extensions, *never* commenced construction. C.A. App. 605-607. Directsat had never proposed to provide any DBS programming itself on its satellite, but from the beginning had planned to "lease all its transponder capacity to program packagers and other businesses." [14] Directsat simply sold its bare authorization to EchoStar within a few months of receiving its channel assignments from the FCC.

By sharp contrast, Advanced pursued its application over the long term, proposed the implementation of digital transmission technology which became the industry standard, developed ambitious plans for educational services to America's schools and worked with FEAT to promote the use of DBS technology for educational and informational purposes. C.A. App. 437-441. The record also made clear that ACC had made greater progress toward bringing its proposal to fruition having expended in excess of $7 million in connection with the construction permit for its DBS system, C.A. App. 764, and had worked with its satellite contractor "to design, develop, and construct ACC's Direct Broadcast Satellite ("DBS") system." [15]

In short, all of the indicia of "warehousing" spectrum—the purported basis for distinguishing *Directsat* from *Advanced*—applied clearly to Directsat, an applicant that did not intend to use transponders for its own programming, made no technical innovations, repeatedly delayed its construction schedule, never commenced construction

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[14] *Continental Satellite Corp.*, 4 FCC Rcd. at 6296.

[15] Letter from Steven D. Overly, General Counsel, Lockheed Martin to Chairman Reed E. Hundt (September 25, 1995) (C.A. App. 766).

and immediately sold its permit upon receiving its authorization. By contrast, Advanced was branded as a spectrum speculator despite the fact that it had pioneered DBS technology, fought for technical changes that became the industry standard, developed innovative programming formats, expended significant resources and made construction progress. It is, as senior FCC Commissioner James H. Quello wrote in dissent, "somewhat akin to rewarding a survivor of the Charge of the Light Brigade by putting him in front of a firing squad." Pet. App. 72.

Deference to the Commission's decision also is inappropriate because the agency "entirely failed to consider an important aspect of the problem," *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43. The FCC completely ignored the long-term promotion of educational programming on DBS by Advanced and FEAT. FEAT had worked with Petitioner since the mid-1980s to develop innovative ways to deliver educational programming to every school, library and home in America. Toward that end, Advanced had agreed to donate two transponders for use by FEAT and the YES Networks, and had pledged $15 million to FEAT in support of these efforts. C.A. App. 740-741. FEAT notified the Commission that "ACC is now working with Tempo Satellite, Inc., to dedicate two transponders to educational uses as Advanced originally proposed." *Id.* at 740.

Such educational initiatives are a core component of the public interest, as the FCC has emphasized repeatedly in recent years. Quoting the legislative history to the Children's Television Act, the Commission recently described this interest as "compelling," and stated "[i]t is difficult to think of an interest more substantial than the promotion of the welfare of children who watch so much television and rely upon it for so much of the information they receive." [16] Such public interest concerns

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[16] *Policies and Rules Concerning Children's Television Programming*, FCC 96-335 (released Aug. 8, 1996), ¶ 154, (quoting S. Rep.

have not been limited to rulemaking proceedings; the FCC also has promoted educational programming in connection with its approval of other waiver requests. Indeed, just one month after the Commission canceled the Advanced authorization, it granted an ownership waiver request associated with the CBS, Inc./Westinghouse Electric Corporation merger, in part because Westinghouse had "made a voluntary commitment to augment the amount of children's programming broadcast over the CBS network and its owned and operated stations." *See Stockholders of CBS, Inc.*, 11 FCC Rcd. 3733, ¶ 60 (released Nov. 22, 1995). Similarly, the FCC has relaxed cable television rate regulations where operators have pledged to provide service connections and other benefits to public schools.[17]

Given the Commision's fixation on using its regulatory processes to promote educational initiatives, it is all the more perplexing that the FCC failed *even to mention* the proposal for educational programming presented to it in the *Advanced* proceeding. Instead, MCI's proposed $175 million bid loomed larger in the Commission's mind, and was quoted repeatedly in the *Advanced* Order and in the FCC's associated auction rulemaking proceeding. In this single action, the FCC subverted both its core public interest responsibilities regarding educational programming as well as the statutory prohibition against making monetary considerations the fulcrum of Commission public interest determinations. In such circumstances, the deferential treatment accorded the Commission by the Court of Appeals was highly inappropriate.

No. 227, 101st Cong., 1st Sess. 17 (1989)). *See also* 47 U.S.C. § 254(h) (establishing special rates for telecommunications services for educational institutions).

[17] *E.g., Continental Cablevision, Inc.*, FCC 96-358 (released Aug. 23, 1996) (amended social contract); *Social Contract for Time Warner*, 11 FCC Rcd. 2778 (1995).

II. THE COURT OF APPEALS ERRED IN DEFERRING TO THE COMMISSION'S DECISION WHERE THE ORDER DID NOT DEMONSTRATE AGENCY EXPERTISE AND THE CIRCUMSTANCES SURROUNDING IT REVEALED EVIDENCE OF PREJUDGMENT.

The Court of Appeals also erred in deferring to the Commission's decision because deference is inappropriate where an agency "simply has not exercised its expertise." *Public Citizen Health Research Group v. Tyson*, 796 F.2d 1479, 1505 (D.C. Cir. 1986). In the decision under review, the Commission exhibited a marked *lack* of expertise combined with troubling indications of prejudgment of the issues. Accordingly, the FCC's decision should have been subjected to more rigorous review.

From the beginning, there were danger signals that the Commission's expertise was at a low ebb in the *Advanced* proceeding. The initial decision by the International Bureau misconstrued Commission precedent that had established a more flexible standard for evaluating DBS extension requests, stating that the FCC had denied extension requests for two DBS permitees when, in fact, the agency had granted both requests.[18] In its attempt to explain away this gross error, the full Commission acknowledged the mistake, but claimed that "[t]his misstatement does not detract from the logic of the order." *Advanced Corp.*, 11 FCC Rcd. at 3410 n.54 (Pet. App. 28). Unfortunately, the Commission compounded the error by basing its decision on the fictitious distinction between Directsat (which it claimed made "steady and consistent [progress] with the schedule established in its construction contract" despite its repeated delays and lack of construction), *id.* at 3420 (Pet. App. 42-43), and Advanced, whose progress the Commission ignored.

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[18] *See Advanced Communications Corporation*, 10 FCC Rcd. 13337, 13340-41 (International Bureau 1995) (quoting *USSB I*, 8 FCC Rcd. at 6859) (Pet. App. 85-86).

The lapses of Commission expertise are even more serious in this case because of the disconcerting habit by key decisionmakers of making statements to the press regarding the merits of an ongoing adjudicatory proceeding. For example, Scott B. Harris, Chief of the Bureau that originally had misunderstood Commission precedent, further demonstrated a failure to grasp the record, telling BUSINESS WEEK during the proceeding that "You can't just take a public asset, not do anything with it, and then go off to the beach." *See A Windfall Lost in Space*, BUSINESS WEEK, July 17, 1995, at 38. Similarly, Chairman Reed Hundt was quite vocal about the decision both in press interviews and public speeches. In one interview, given before the decision was officially released, the Chairman revealed that he met with the chairman of MCI shortly before that party announced its $175 million bid (thus explaining why the MCI letter filed with the Commission "reaffirmed" an intention not previously disclosed on the record). Chairman Hundt added that he spoke with TCI and Primestar after receiving MCI's "pledge" letter, explaining that "[i]f you have anything to say you'd better do so in the next few hours or days because I intend to make a decision."[19] Chairman Hundt subsequently made a number of speeches in which he joked about the financial motivation underlying the *Advanced* decision.[20]

Not only are such public statements unseemly when made by decisionmaking personnel in the course of an adjudicatory proceeding, the case law is clear that a decision is tainted if such statements suggest that a Commis-

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[19] *See Hundt Explains Call for Auction*, SATELLITE BUSINESS NEWS, Oct. 25, 1995, at 25, 26. *See also Fate of FCC DBS Decision Uncertain in Face of Potential Hill Action*, COMMUNICATIONS DAILY, Sept. 15, 1995, at 3.

[20] Reed E. Hundt, *Speech to the Artist's Rights Foundation* (Feb. 15, 1996) (as prepared for delivery) ("We intended all along [in the *Advanced* case] to raise in auctions of the airwaves more money than Bill Gates has."). *See* Gary Samuels, *Gore-ing Malone's Ox*, FORBES, Sept. 9, 1996, at 56.

sioner " 'has in some measure adjudged the facts as well as the law in a particular case in advance of hearing it.' " *Cinderella Career & Finishing Schools, Inc. v. FTC*, 425 F.2d 583, 591 (D.C. Cir. 1970) (quoting *Gilligan, Will & Co. v. SEC*, 267 F.2d 461, 469 (2d Cir.), *cert. denied*, 361 U.S. 896 (1959)). It is well established that such public statements violate both the appearance and the substance of due process. *Stivers v. Pierce*, 71 F.3d 732, 746-748 (9th Cir. 1995); *Antoniu v. SEC*, 877 F.2d 721, 724-726 (8th Cir. 1989), *cert. denied*, 494 U.S. 1004 (1990).

Where, as here, "statements on the merits" were made by those who were called upon to make "factual determinations on contested fact issues," the proceeding is not attended " 'with every element of fairness,' " as is required, or even the " 'appearance of complete fairness.' " *Antoniu*, 877 F.2d at 724-725 (quoting *Texaco, Inc. v. FTC*, 336 F.2d 754 (D.C. Cir. 1964), *vacated on other grounds*, 381 U.S. 739 (1965) (*per curiam*)). The unusual public discussion of adjudicatory issues by decisionmaking personnel in this case should have tipped off the Court of Appeals that greater scrutiny was required. *See, e.g., United Church of the Medical Center v. Medical Commission*, 689 F.2d 693, 698-700 (7th Cir. 1982).

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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